This particular ward was found to be bipolar (see opinion of the Court of Appeals at page 2) and was on medication (Hearing before the Trial Court TR 16). Without independent counsel, who is available to question, on Petitioner's behalf, the continued need for medication? Psychotropic and neuroleptic drugs are particularly dangerous and some physicians feel they never should be used. See Peter Breggin *Toxic Psychiatry*, 1991 New York: St. Martin's Press and *Your Drug May Be Your Problem*, Da Capo Press, 2000. If the drugs are not dangerous, there is still the question of whether their use is but one more factor adding to Petitioner's incompetence and making her less able to stand up for herself without counsel, See Breggin id. In this case Petitioner has no family and no friends. Is Petitioner doomed to accept for the rest of her life the decision of her guardian about her medication needs and the decision of her guardian regarding the plethora of other instances where she may be injured and her rights infringed?

IV. Conclusion

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

Paul D. Gilbert
Counsel of Record
120 W. Second Street, #503
Dayton, OH 45402
(937) 224-7311

2005

APPENDICES

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THE SUPREME COURT OF OHIO

In re: Guardianship of Carol Rinehart,
An Adult Incompetent Case No.05-295

ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

(Montgomery County Court of Appeals; No. 20376)

(Signed)_____
THOMAS J. MOYER
Chief Justice

THE SUPREME COURT OF OHIO

In re: Guardianship of Carol Rinehart,
An Adult Incompetent Case No. 05-295

RECONSIDERATION ENTRY

Montgomery County

IT IS ORDERED by the Court that the motion for reconsideration in this case be, and hereby is, denied.

(Montgomery County Court of Appeals; No. 20376)

(Signed)
THOMAS J. MOYER
Chief Justice

IN THE COURT OF APAPEALS FOR MONTGOMERY COUNTY, OHIO

In re: Guardianship of C.A. Case No. 20376

CAROL RINEHART, T.C. NO. 341082

An Adult Incompetent **FINAL ENTRY**

Pursuant to the opinion of this court rendered on the 30th day of December, 2004, the judgment is affirmed.

Costs to be paid as stated in App. R. 24.

(Signed)_____
WILLIAM H. WOLFF, JR.
Judge

(Signed)_____
THOMAS J. GRADY
Judge

(Signed)_____
FREDERICK N. YOUNG
Judge

Copies mailed to:

Paul D. Gilbert
120 W. Second Street
Suite 503
Dayton, Ohio 45402

David R. Schmidt
1200 East Dorothy Lane
Dayton, Ohio 45419

Hon. Alice O. McCollum
Probate Court
41 N. Perry Street
Dayton, Ohio 45422

IN THE COURT OF APPEALS FOR MONTGOMERY COUNTY, OHIO

In Re: Guardianship of	C.A. CASE NO. 20376
CAROL RINEHART	T.C. NO. 341082
An Adult Incompetent	(Civil Appeal from Common Please Court, Probate Division)

OPINION

Rendered on the 30th day of December, 2004.

PAUL D. GILBERT, Atty, Reg. No. 0010129, 120 W. Second Street, Suite 503, Dayton, Ohio 45402
Attorney for Appellant

DAVID R. SCHMIDT, Atty, Reg. No. 0012588, 1200 East Dorothy Lane, Dayton, Ohio 45419
Attorney for Appellee

WOLFF, J

Paul Gilbert appeals from a judgment of the Montgomery County Court of Common Pleas, Probate Division, which refused to direct the guardian of Carol Rinehart to allow him to function as Rinehart's attorney.

Rinehart suffers from bi-polar disorder, deafness, and a number of other debilitating conditions. In January 2003, she was adjudicated incompetent, and David Schmidt was appointed to serve as guardian of her person. In February 2003, Schmidt notified Gilbert, who had had an attorney-client relationship with Rinehart of several years, that his

services on Rinehart's behalf were no longer needed. Gilbert filed a Motion for Order Permitting Counsel to Confer and Consult with Ward and Directing Guardian and Custodian to Cooperate. In March 2003, Schmidt was appointed guardian of Rinehart's estate.

Gilbert's motion was referred to a magistrate, who conducted a hearing and issued a report and recommendation denying the motion. Gilbert filed objections to the magistrate's report and recommendation, and on February 9, 2004, the trial court conducted a second hearing. The trial court then adopted the magistrate's report and recommendation.

Gilbert raises one assignment of error on appeal.

"THE TRIAL COURT COMMITTED ERROR IN NOT SUSTAINING APPELLANT"S MOTION OR, IN THE ALTERNATIVE IN NOT APPOINTING OR AUTHORIZING OTHER COUNSEL TO SEE AND CONSULT WITH APPELLANT."

Gilbert contends that Rinehart had a "right to continue a previous contract entered before guardianship" and a constitutional right to independent legal representation. Gilbert further argues that Rinehart is entitled to her choice of counsel.

The parties do not dispute that Rinehart is entitled to an attorney. Schmidt, who is also an attorney, agrees with Gilbert that "the 14th Amendment to the United States Constitution provides access to independent counsel by an adjudicated incompetent." The parties disagree as to whether Rinehart is entitled to her own choice of counsel, as evidenced by her hiring of Gilbert prior to the finding of incompetency, or whether the guardian is free to hire

someone to handle Rinehart's legal representation. In our view, the law and common sense point to only one result.

R.C. 2111.13© provides:

"A guardian of the person may authorize or approve the provision to the ward of medical, health, or other professional care, counsel, treatment, or services unless the ward or an interested party files objections with the probate court, or the court, by rule or order, provides otherwise."

Legal services clearly fall within the definition of services to be authorized or approved by the guardian. Thus, the selection of an attorney for an incompetent person is within the purview of the guardian. This conclusion is bolstered by R.C. 2111.50(B), which provides that, through the powers conferred by the probate court, the guardian possesses "all the powers that relate to the person and estate of the person and the he [the person] could exercise if present and not a minor or under a disability, except the power to make or revoke a will." The powers include, but are not limited to, the power to enter into contracts. R.C. 2111.50(B)(3).

Gilbert relies on the fact that his legal representation of Rinehart allegedly began before she became incompetent. However, Rinehart was not under any obligation to continue her legal relationship with Gilbert. Schmidt, in his role as guardian, had the authority to hire a different attorney, or no attorney at all, as he saw fit, just as Rinehart could have done if she were competent.

Gilbert also asserts that an ongoing relationship with an attorney is essential to the protection of Rinehart's due process rights. Schmidt counters that there are numerous ways to protect Rinehart's interests, but that the permanent

retention of an attorney is not one of them. Schmidt points out that, if concern arose over the adequacy of his representation of Rinehart's legal rights, the appropriate remedy would be for the concerned party to challenge his guardianship, rather than to attempt to achieve the appointment of an attorney who operated outside the bounds of the guardianship. We agree with this assessment. Moreover, we are un-persuaded by Gilbert's assertion that an attorney should immediately be appointed for Rinehart's protection, even if it not him; it would be speculative for us to conclude that Rinehart needs legal services at this point. The constitutional right to an attorney is not violated if one has no need for an attorney. Furthermore, it appears that Rinehart's due process rights were duly respected in the determination of incompetency and the appointment of the guardian.

The cases upon which Gilbert relies to not support his position. For example, Gilbert relies on Friedrich v. BancOhio National Bank (1984), 14 Ohio App. 3d 247, 470 N.E.2d 467, for the proposition that "[n]othing in Ohio law allows a guardian carte blanche authority to terminate previous contracts of a ward." However, Friedrich dealt with whether a guardian had the authority to terminate an intervivos trust, and its holding relied very much on the law of trusts, which is unique and separate from the law of contracts. Similarly, in Witt v. Ward (1989), 60 Ohio App.3d 21, 573 N.E.2d 201, the court's recognition of limitations on the powers of the guardians was closely tied to the testamentary nature of the joint and survivorship accounts and payable on death accounts that were in dispute, and not on the law of contract. Moreover, Gilbert did not have a preexisting contract with Rinehart for future employment, and it is beyond dispute that an incompetent person cannot enter into contracts. See R.C. 2111.50 (B)(3).

In sum, Gilbert's argument that Rinehart should be allowed to employ an attorney of her choice based on her current views or her past decisions is inconsistent with the concepts of incompetency and guardianship. We conclude that neither nor Rinehart had the right to insist upon Gilbert's continued legal representation of Rinehart, and the trial court was under no obligation immediately to appoint a different attorney for Rinehart. Schmidt has been entrusted with looking after Rinehart's best interests, including her legal interests, and if he fails to do so, other avenues are available through the probate court to remedy that situation.

The assignment of error is overruled.

The judgment of the trial court will be affirmed.

GRADY, J. and YOUNG, J., concur.

Copies mailed to:

Paul D. Gilbert
David R. Schmidt
Hon. Alice O. McCollum

IN THE PROBATE COURT OF MONTGOMERY COUNTY, OHIO

IN THE MATTER OF THE GUARDIANSHIP OF	**CASE NO. 341082 (McCOLLUM, J.)**
CAROL RINEHART, AN ADULT INCOMPETENT	**DECISION, ORDER AND ENTRY ADOPTING MAGISTRATE'S DECISION**

This matter came before the court on Paul Gilbert's objections to the Magistrate's report. The court held a hearing on February 9, 2004. Both parties, David Schmidt and Paul Gilbert, were present and presented their respective arguments.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

On January 14, 2003, David Schmidt was appointed guardian of the person of Carol Rinehart (hereinafter referred to as the ward). At the hearing, Paul Gilbert, allegedly representing the ward, objected to the application but to no avail. The same day, the guardian notified the personnel at Harborside Nursing Home, the ward's residence, of his appointment and his desire to terminate Gilbert's attorney-client relationship with the ward. On February 4, 2003, the guardian mailed a letter to Gilbert terminating his services. Subsequently, on March 4, 2003, David Schmidt was appointed guardian of the ward's estate.

On February 14, 2003 Gilbert objected to his dismissal and filed a Motion to Consult and Confer with the

Ward and Directing Guardian and Custodian to Cooperate. The hearing on his motion was held before the Magistrate on March 18, 2003. Subsequent to the hearing, the parties submitted numerous memoranda. The Magistrate rendered his decision on July 24, 2003 finding that pursuant to R.C.§2111.13©, the guardian possessed the authority to terminate Gilbert's relationship with the ward that was formed before the ward was declared incompetent. Gilbert objects to the Magistrate's findings.

LAW AND ANALYSIS

The Court carefully reviewed the memoranda that he filed before the Magistrate's decision, the Magistrate's decision, the plaintiff's objections to the decision and the transcript of the magistrate's hearing, prior to the Court's hearing on February 9, 2004. Gilbert's major contention is that the guardian does not have the authority to terminate his services, as then the ward would be deprived of her due process right to counsel.

Actually, Mr. Gilbert confuses the issue. The issue is not whether the ward is entitled to independent counsel. All parties agree that should the ward need or desire counsel, the ward would certainly be entitled to counsel. There is no due process or constitutional issue in this case. The Court adopts the Magistrate's decision on this issue.

The only issue is whether the guardian has the authority to remove this particular attorney, Mr. Gilbert. A ward cannot on her own bind her own guardianship estate to obligations bases on contract, unless ratified by the guardian. In *re Guardianship of Allen* (1990). 50 Ohio St. 3d 142,552 N.E.2d 934. Here, the guardian refused to ratify the previous relationship that Gilbert had with the ward. Since the ward has been declared incompetent and a guardian of the estate

and person appointed for her, she cannot contract for legal services.

In the application for the guardianship, the independent evaluator who observed the ward found that the ward was unable to care for her daily needs or her financial affairs, that her house had been condemned and she was in need of dental work. If Gilbert had an attorney-client relationship with the ward since before her parents died, for more than ten years, how did he allow the ward's house to be condemned? How did he allow the wasting of her assets?

Now that the guardian more closely monitors the ward's welfare and financial affairs, the Court finds that it is in the ward's best interest that Gilbert's attorney-client relationship with the ward be terminated. There is no need for duplicative services nor services for which the ward cannot contract. The guardian has the authority to terminate Gilbert's services. The Court **ADOPTS** the magistrate's decision on this issue.

CONCLUSION

Accordingly, the Court finds that Gilbert's objections to the Magistrate's Decision are not well taken. The court, therefore, **ADOPTS** the magistrate's decision.

IT IS SO ORDERED.

(Signed)_____
ALICE O. McCOLLUM,
JUDGE

Case No.: 341082

David R. Schmidt
1200 East Dorothy Lane
Dayton, Ohio 45419

Paul D. Gilbert
120 West Second Street
Suite 503
Dayton, Ohio 45402

Copies sent by ordinary mail to the above named parties on 2-13-04 by _____.

FINAL APPEALABLE ORDER

TO THE CLERK: Please serve a notice of the judgment and its date of entry upon the journal to all parties who are not in default for failure to appear.

(Signed)_____